

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Matter of)

Implementation of Sections 3(n) and)
 332 of the Communications Act)

Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

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 FEDERAL COMMUNICATIONS COMMISSION
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**COMMENTS OF
 RAM MOBILE DATA USA LIMITED PARTNERSHIP**

RAM Mobile Data USA Limited Partnership ("RMD") hereby submits the following comments with respect to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. RMD's comments focus on the definition of certain terms in the new legislation that are crucial to the determination of the extent to which land mobile service providers will be deemed to be providers of "commercial mobile service." RMD urges that this definitional process be guided by the underlying Congressional intent of the legislation, which was to group under the "commercial" heading providers of land mobile services that are, from a customer perspective, substantially identical to conventional cellular voice telephone service, but to leave as "private" all other land mobile service providers.¹

I. OVERVIEW

The scope of the new legislation and, in particular, the degree to which land mobile service providers will be deemed to be providers of "commercial mobile service" is, in large measure, dependent upon the Commission's interpretation of

¹ This intent was evidenced as early as July 1992 when the Communications Subcommittee of the Senate Committee on Commerce, Science, and Transportation held a hearing on mobile communications. The hearing focused primarily on the blurring of lines between conventional cellular telephone service providers and service providers who, while regulated as private carriers, hold themselves out to the public as offering services substantially similar to such conventional cellular service. See, inter alia, Statement of Kenneth M. Mead, Director, Resources, Community, and Economic Development Division of the U.S. General Accounting Office (Released July 1, 1992).

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several terms used in the statute, including "interconnected service" and "functional equivalent." An overbroad interpretation of these terms could lead to the conclusion that virtually all land mobile communications service providers currently licensed in the specialized mobile radio ("SMR") service should be deemed to be providers of "commercial" service and regulated accordingly. Conversely, more carefully delineated interpretations would define as "commercial" only those SMR systems that hold themselves out as, essentially, a third cellular system, offering consumers communications services that are functionally indistinguishable from ordinary cellular voice telephone service. Such an interpretation would leave in the less regulated "private mobile service" category all SMR systems that do not provide such broad consumer offerings.

The Congress expressly left these definitional interpretations to the Commission. In so doing, however, it made clear that its intent was not broadly to sweep most or all of the SMR industry into the commercial category. For instance, as Senator Inouye, Chairman of the Senate Communications Subcommittee, was careful to note in his comments concerning the legislation, "providers of specialized mobile radio services that do not compete with cellular service are not intended to be covered under the definition of commercial mobile services."² As the Commission turns to its task of implementing amended Sections 3(n) and 332 of the Communications Act of 1934, as amended, (the "Act"), the central Congressional purpose underlying the legislation should control.

² 139 Cong. Rec. S 7913, S 7949 (June 24, 1993). While the FCC has authorized cellular service providers to use a portion of their spectrum to implement advanced technologies and auxiliary services on a secondary basis to conventional cellular telephone service (see Report and Order, GEN. Docket No. 87-390, 3 FCC Rcd 7033 (1988)), these secondary services are not the focus of the statute.

II. DEFINITION OF INTERCONNECTED

Section 332(d)(1) of the Act now provides that a mobile service will be classified as a "commercial mobile service" if it: (1) is "provided for profit," and (2) makes "interconnected service" available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public. Section 332(d)(2), in turn, defines "interconnected service" to mean a "service that is interconnected with the public switched network" or "service for which an interconnection request is pending under Section 332(c)(1)(B)." Accordingly, the definition of "interconnected" is critical to a determination of which mobile services are deemed "commercial." Congress expressly directed the Commission to define "interconnected." Section 332(d)(2).

RMD concurs with the Commission's observation that Congress, by use of the term "interconnected service," intended to distinguish between those mobile service systems that are physically interconnected with the public switched network ("PSN"), and those that are interconnected and make interconnected service available to their subscribers. Notice at 15. The Senate version of Section 332, which was largely adopted by the Conference Committee, stated that "interconnected service must be made available to the public," whereas the House version required only that the service offered to the public be interconnected (*i.e.*, only "one aspect" of the service need have been interconnected to the PSN).³ By adopting the Senate version and, therefore, rejecting the House version, Congress intended "interconnected" to mean something more than a mobile service that simply touched the PSN at some point but did not make interconnected service broadly available to the public.⁴

³ H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report") at 496.

⁴ RMD is, therefore, opposed to a definition of interconnection that would resemble that found in International Satellite Systems (Report and Order, Establishment of Satellite Systems Providing International Communications, CC Docket 84-1299, 101 F.C.C.2d 1046 (1985), recon., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), further recon., 1 F.C.C. Rcd. 439), which would require virtually every service that so much as touched the PSN to be deemed a commercial service and subject to common carrier regulation. Such an approach would obliterate the distinction between services that are physically interconnected, and services that are physically interconnected and that provide interconnected service.

After examining the language of the statute, the relevant legislative history and Commission precedent concerning use of the term “interconnected” in other contexts, RMD urges the Commission to adopt the following definition of “interconnected”:

A land mobile service is interconnected if, through direct connection with the public switched network, the licensee offers its subscribers, on a real-time basis, the ability to send and receive communications to and from end-user telephones connected with the public switched network. Land mobile licensees that use the public switched network strictly for internal control purposes, including circuits for transmitter control and/or to connect nodes on their network, are not considered to be interconnected for purposes of this rule part. A land mobile licensee that is not interconnected for the purposes of this rule part shall not be deemed to be interconnected solely because a subscriber of the licensee uses the licensee’s capacity or facilities (i) to provide an interconnected service to a third party, or (ii) to obtain an interconnected service from a third party interconnected service provider.

RMD proposes this definition for a number of reasons. First, the definition embodies the Congressional intent underlying the statute in that it effectively reaches providers of conventional cellular telephone service, as well as providers of services that are substantially similar to conventional cellular telephone services from a consumer perspective. Moreover, the definition is careful not to disturb the private status of those services that are not substantially identical to conventional cellular telephone service.

Second, the foregoing definition is cognizant of the statutory distinction drawn between mobile services that are physically interconnected, and mobile services that are physically interconnected and that provide interconnected service. Thus, as reflected in the definition, and consistent with Congressional intent, a mobile system that simply uses some portion of the PSN in its system backbone would not be considered an “interconnected” system if it did not also provide its subscribers with direct, real-time access to and from ordinary telephones within the PSN.

Third, and related to the immediately preceding paragraph, the definition focuses on the actual service the service provider offers its customers over its system,

not whether the system lends itself in some manner to the provision of interconnected service. Thus, the fact that a private mobile service subscriber may use the private mobile licensee's network to provide interconnected service to third parties, or to obtain interconnected service from a commercial mobile service provider, will have no bearing on the regulatory treatment of the underlying private mobile service provider.

III. DEFINITION OF PRIVATE MOBILE SERVICE

Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service "or the functional equivalent of a commercial mobile service." As the Notice acknowledges, this Section is facially ambiguous: it is impossible to determine from a reading of the statute whether Congress intended the term "functional equivalent" to expand or to limit the commercial mobile services category. Notice at 29. This ambiguity flows from the manner in which the word "or" is used in Section 332(d)(3): on the one hand, it can be read expansively to include in the commercial mobile service category a service that does not meet the literal definition of commercial mobile service but is considered such a service, nonetheless, because it is the functional equivalent of such a service; on the other hand, it can be read narrowly to exclude from the commercial mobile service category a service that meets the literal definition of such a service, but is, nonetheless, not considered a commercial mobile service because it is not the functional equivalent of such a service.

Under long-standing principles of statutory interpretation, when a statute is ambiguous on its face, courts and administrative agencies must -- as the FCC has done in the Notice -- turn to legislative history to determine Congressional intent.⁵ Reading the statute and the Conference Report in the broader context of the Congressional intent underlying the regulatory parity legislation, it is clear that Congress intended the term "functional equivalent" to limit, rather than to expand, the category of commercial mobile service.

First, as discussed above, Congress intended to include under the term commercial mobile carrier those service providers who offer conventional cellular telephone service, and those that, while not cellular service providers *per se*, offer

⁵ See, *inter alia*, American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568-69 (D.C. Cir. 1987).

services that are substantially identical to conventional cellular service from the consumers perspective.

Second, the Conference Report contains an example concerning the manner in which functional equivalent could be applied which clearly illustrates that Congress intended the term to narrow, not to expand, the commercial mobile service category.⁶ The example demonstrates that Congress sought to preserve the private mobile status of many land mobile carriers that might fall under the literal definition of commercial mobile service provider, but which are not the functional equivalent of such in that they do not provide conventional cellular telephone service.⁷

Third, the House and Senate versions of Section 332 indicated that "commercial mobile service" should be narrowly defined, and that any mobile service that does not meet this definition should be treated as private. Conference Report at 495-496. It is reasonable to conclude, therefore, that the Conference Committee would neither disregard the House and Senate approach, nor seek to turn this approach on its head by using "functional equivalent" to expand, rather than to limit, the category of commercial mobile service.

⁶ Conference Report at 496. The Conference Report states:

[t]he Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.

⁷ The Commission has in the past looked to specific examples employed in the legislative history of a statute when attempting to discern Congressional intent. See, inter alia, Memorandum, Opinion and Order, DA-93-589, 8 FCC Rcd 3925, 3926 (1993) (FCC found that WNCY's assertion that it was a qualified non-commercial educational television station for purposes of the Cable Act (47 U.S.C. § 535) was supported by fact that Congress used it as an example of such in the legislative history of the Cable Act); Report and Order, MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111, 2114 (1991) (FCC focuses on examples used in legislative history in implementing the Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b, 394).

The Notice also requests comment on the manner in which a non-interconnected mobile service provider should be classified in light of the term functional equivalent. Notice at 38 (making specific reference to RMD at n.50).⁸ Consistent with the foregoing, the Commission should not classify such a service as commercial. First, by virtue of the fact that the service is not interconnected, it does not meet the literal definition of a commercial mobile service. Second, given that the basis for commercial status is whether a service is interconnected, it cannot logically follow that a non-interconnected service is the functional equivalent of a commercial mobile service. Thus, as discussed above, "functional equivalent" makes sense only in the context of a service that is interconnected but is regulated as private, nonetheless, because it is not the functional equivalent of a commercial mobile service.

⁸ RMD requests that the Commission clarify an assertion made in the Notice that SMR eligibility rules preclude the provision of SMR services to foreign governments and their representatives. Notice at 24 and n.29. Prior to February 1988, SMR licensees were prohibited from providing their services to any entity or person that could not be licensed under Part 90, Subparts B, C, D, or E (*i.e.*, federal government agencies, individuals, foreign governments, and representatives of foreign governments). In February 1988, however, the FCC explicitly abolished this restriction on the provision of SMR services to individuals and federal government agencies, finding the arguments against expanding eligibility, in general, to be unpersuasive. Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1840-41 (1988). The Report and Order was silent about the extension of SMR service to foreign governments and their representatives, neither restating nor justifying their continued exclusion as eligible recipients. It is, therefore, reasonable to conclude that the term "representatives of foreign governments" was meant to be embraced, more generally, by the term "individuals." Likewise, it is reasonable to conclude that, if a representative of a foreign government is an eligible end-user of SMR services, the foreign government that he or she represents must also be eligible. It is not reasonable to conclude, however, that the Commission intended to continue to exclude foreign governments and their representatives from the class of eligible SMR users, particularly in light of the fact that the Report and Order offered no explanation for such a result, and given that foreign governments and their representatives are eligible end-users of cellular phones and commercial pagers. There appears to be no sound basis for such discriminatory treatment. Accordingly, RMD requests that the Commission make clear that foreign governments and their representatives are eligible end-users of SMR services under FCC Rule 90.603(c).

IV. DISTINCTION BETWEEN ACCESS TO PSN AND "INTERCONNECTED"

The Notice requests comment on the interconnection rights of existing mobile services that will be classified as private mobile service providers. Notice at 72. RMD agrees with the Commission's conclusion that the FCC has authority to require common carriers to provide interconnection to private entities, and that the new legislation has done nothing to circumscribe this authority. Id. Moreover, RMD supports the Commission's proposals to create a federally-protected interconnection right for Personal Communications Service ("PCS") providers.

RMD urges the Commission, however, not to limit this right to PCS providers. In short, the same arguments that justify the creation of a federal right for PCS providers (*e.g.*, to ensure the development of the service and to guard against discriminatory access) justify the creation of a federally-protected interconnection right for all mobile service providers, be they commercial or private.

Finally, the Commission must be careful to make clear that exercising interconnection rights will in no way have the effect of converting a private mobile service provider to a commercial mobile service provider. As discussed above, Congress intended to distinguish between those mobile service systems that are physically interconnected with the PSN, and those that are interconnected and make interconnected service available to their subscribers. Accordingly, the FCC should make clear that interconnection standing alone is insufficient to bestow commercial mobile service status.

V. CONCLUSION

Sections 3(n) and 332 of the Act were intended to place conventional cellular telephone service providers on an equal regulatory footing with providers of service that is substantially similar to conventional cellular service but which have, heretofore, been regulated as private mobile services. These Sections were not, however, intended to subject all mobile service providers to common carrier regulation.

Accordingly, in carrying out its mission to implement the regulatory parity legislation, the Commission must take pains to define narrowly the terms "interconnected" and "functional equivalent." Finally, the Commission should create a

federally-protected interconnection right for all mobile service providers, and ensure that "interconnected" for the purposes of assuring non-discriminatory access to the PSN is distinct from "interconnected" for the purposes of determining commercial carrier status.

Respectfully submitted,

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